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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

CITADEL CORP., PETITIONER

v.

PUERTO RICO HIGHWAY AUTHORITY
AND PUERTO RICO LAND AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

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QUESTION PRESENTED

Whether petitioner's damage action under the Civil Rights Act of 1871, 42 USC Section 1983, and the Fifth and Fourteenth Amendments against a state-created public corporation for an unconstitutional regulatory "taking" of its land is cognizable in a federal court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the First Circuit in this case.

THE OPINION BELOW

The opinion of the court of appeals (App. A, infra, 1a - 13a) is reported at 695 F2d 31.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a - 13a) was entered on

December 22, 1982. A petition for rehearing was denied on February 2, 1983 (App. B, infra, 13a). The jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States states in relevant part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States states in relevant part: "No State shall... deprive any person of life, liberty, or property, without due process of law;"

3. Section 1 of the Civil Rights Act of 1871, 42 USC Section 1983, states the following:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This is an action brought in the United States District Court for the District of Puerto Rico by petitioner, the owner of 15 acres of unimproved land located in San Juan, Puerto Rico, pursuant to Section 1 of the Civil Rights Act of 1871, 42 USC Section 1983 (herein called the "Act") and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioner claims that defendants under color of state law, custom and usage

kept petitioner's land frozen for 17 years in order to reserve it for acquisition for the construction of a highway interchange in violation of the Act and petitioner's Constitutional rights, thereby entitling petitioner to monetary damages.

The district court granted defendants' motion to dismiss on the grounds of collateral estoppel from which order petitioner appealed to the court of appeals. On December 22, 1982, the court of appeals held that collateral estoppel did not bar petitioner's action in the district court but affirmed the dismissal on the grounds that petitioner's claim for damages stemming from an unconstitutional regulatory "taking" of its land is not cognizable in a federal court and that petitioner's remedy is limited to enjoining defendants' unconstitutional conduct. The court of appeals denied petitioner's petition for rehearing on February 2, 1983.

REASONS FOR GRANTING THE PETITION

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT AND WHAT APPEARS TO BE THE NOT CLEARLY SETTLED POSITION OF THIS COURT ON THE SAME MATTER.

This case presents the important Constitutional and federal law question of whether a landowner is entitled to damages in a federal court for an unconstitutional regulatory "taking" by a state-created public corporation.

The decision by the court of appeals below erroneously limited the liability of state-created public corporations under the Act and the Fifth and Fourteenth Amendments to enjoining the unconstitutional land use regulation and held that damage actions do not lie in the federal courts for an unconstitutional regulatory "taking." /App. A, infra, 5a - 13a/. If the court of

appeals is correct, petitioner will be deprived of any remedy for the 17 year period during which defendants kept petitioner's property frozen.

The dissenting and concurring opinions of this Court in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (herein called "San Diego Gas"), which appear to reflect the view of the majority of this Court, conflict with the court of appeals below.

The ruling below by the court of appeals is based upon its own decision in Pamel Corp. v. Puerto Rico Highway Authority, 621 F2d 33 (1st Cir. 1980) and, in addition to conflicting with what appears to be the position of this Court in San Diego Gas, as aforesaid, also conflicts with decisions (1) of this Court citing San Diego Gas (Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264, 305-306 (1981) and Parratt v. Taylor, 451 U.S. 527, 553 n.12);

(2) four other courts of appeals (Barbian v. Panagis, 694 F2d 476, 482 n.5 (7th Cir. 1982), Hernandez v. City of Lafayette, 643 F2d 1188, 1200 (5th Cir. 1981), cert. den. 102 S.Ct. 1251, Shamrock Development Co. v. City of Concord, 656 F2d 1380, 1384 (9th Cir. 1981), Fountain v. Metro Atlanta Rapid Transit Authority, 678 F2d 1038, 1043 (11th Cir. 1982), In Re Air Crash in Bali, Indonesia on April 22, 1974, 684 F2d 1301, 1311 n.7 (9th Cir. 1982), Devines v. Maier, 665 F2d 138, 143 (7th Cir. 1981); and (3) two state courts of last resort (County of Kauai v. Pacific Standard Life Ins., 653 P.2 766, 779 n.20, Hawaii, 1982, and Burrows v. City of Keene, 432 A2d 15, 20, N.H. 1981, all of which appear to support the rule that a damage action by a landowner arising out of an unconstitutional regulatory "taking" of land is a cognizable claim in a federal court under

the Act and the Fifth and Fourteenth Amendments.

The error made by the court of appeals in construing the position of this Court, as aforesaid, is compounded by its express disagreement with this Court on an important legal issue which leads to the precise issue in this case; namely, the unwillingness of the court of appeals to characterize an unconstitutional land use regulation as a "taking" (App. A, infra 9a, note 4) as this Court does in San Diego Gas at 628, note 8; and id. at 651-653 (Brennan, J., dissenting).

Thus, in summary, the conclusion of the court of appeals that a state-created public corporation cannot be sued in a federal court for damages because of an unconstitutional regulatory "taking" is inconsistent with the apparent position of this Court, the federal courts of appeal

for the fifth, seventh, ninth and eleventh circuits, and the courts of last resort of the States of Hawaii and New Hampshire.

B. THE ISSUE PRESENTED IS OF GREAT PUBLIC IMPORTANCE AND SHOULD BE SETTLED BY THIS COURT.

The growing conflict between the rights of private landowners and the control of the environment through land use regulation makes the unsettled issue at bar one of great public importance.

Whether a federal court may provide a monetary remedy to a landowner in the case of an unconstitutional "taking" by regulation or whether it must limit its remedy to injunctive relief has been decided, as aforesaid, by other federal courts of appeal and state courts of last resort in conflict with the court of appeals below, but this important question of constitutional and federal law, although

left "barely open" by this Court (Shamrock Development Co. v. City of Concord, supra page 7, at 1384 and San Diego Gas), has not been but should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Lakeville, Connecticut, April 29, 1983.

Robert H. Rout
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203-435-9897

APPENDIX A

THE DECISION BELOW

UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 82-1395

CITADEI CORPORATION,

Plaintiff, Appellant

v.

PUERTO RICO HIGHWAY AUTHORITY, ET AL.,

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

/Hon. Carmen Consuelo Cerezo,
U. S. District Judge/

Before

Coffin, Chief Judge

Timbers, Senior Circuit Judge *

and Bownes, Circuit Judge.

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* Of the Second Circuit, by designation.

Robert H. Rout, for appellant.
Marta Quiñones de Torres, Assistant Solicitor General, with whom Miguel Pagan, Acting Solicitor General, and Americo Serra, Assistant Solicitor General, Department of Justice, were on brief, for appellee.

December 22, 1982

Per Curiam. In a prior action, the District Court for the District of Puerto Rico enjoined various officials of the Commonwealth of Puerto Rico from depriving appellant Citadel Corporation of its property in contravention of the Fifth Amendment (Citadel I). The court in that case, however, denied appellant's claim for damages. In this second action, appellant seeks monetary relief for injuries arising out of the same events, but in this action relief is sought from governmental entities not joined as defendants in the first action. The district court dismissed the instant action on the ground

of collateral estoppel, holding that the issues in Citadel I and Citadel II were identical. [1]

We agree that the instant action should be dismissed, but on the ground of failure to state a claim cognizable in a federal court, rather than on the ground of collateral estoppel.

I.

COLLATERAL ESTOPPEL CLAIM

The district court in the instant case held that Citadel I laid appellant's claims to rest. Appellant had based its first action directly on the Taking Clause of the Fifth Amendment, incorporated in the Fourteenth Amendment, as well as on 42 U.S.C. Section 1983 (1976). That action sought damages and an injunction enjoining the allegedly unconstitutional

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1. Citadel Corp. v. Puerto Rico Highway Authority (Citadel II), No. 79-733 (D.P.R. March 23, 1982).

"freeze" on its property. Governmental agencies had planned to build a highway in the vicinity of appellant's property. In the mid 1960's these agencies proscribed further development on property situated in the path of the proposed highway. Some ten years later, however, plans had not been finalized nor had money been allotted for the construction. The district court in the first action held a full bench trial on appellant's claims. The court decided in favor of appellant on all but the claim for damages. Neither side appealed from the final judgment, although appellant's motion before trial to join additional defendants in the instant action, had been denied on the ground that it was not timely. [2]

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2. The motion to join additional defendants was filed more than two years after plaintiff commenced the action. Citadel Corp. v. Rafael Hernandez Colon (Citadel I) No. 76-1159 (D.P.R. Jan. 8, 1979) (order denying motion to add defendants).

Appellant commenced this second action against the Commonwealth of Puerto Rico, the Puerto Rico Highway Authority, and the Puerto Rico Land Authority while the first action was pending. [3] Appellant makes no claim that it did not receive a fair opportunity to litigate its case fully in Citadel I. The district court held that Citadel I precluded appellant from relitigating the same issue in Citadel II. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-33 (1979). Although factual issues may have been identical, defendants' different identities in the two actions make reliance on collateral estoppel inappropriate.

While the traditional mutuality re-

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3. Appellant filed the second complaint commencing the instant action on March 19, 1979, apparently not including the individual defendants it had attempted to join in Citadel I.

quirement for issue preclusion has been relaxed, see, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 332-37 (1971), affirmative use of collateral estoppel by a nonparty still must be premised on the identity of issues in the two actions. See generally Restatement (Second) of Judgments Section 68 (Tent. Draft No. 4, 1977). Appellees have not demonstrated that the issue of defendants' liability in Citadel II is the same as that in Citadel I. The district court in the first action may have declined to award damages against the defendant public officials for any number of reasons that would not immunize the governmental entities in the second action. The district court's failure in Citadel I to specify its grounds for denying damages makes this likely. The issue of the governmental

entities' liability for alleged unconstitutional action not having been litigated, collateral estoppel does not bar appellant's second action. The critical question therefore is whether appellant has asserted a cognizable theory that would render the governmental entities liable for damages. We turn now to a consideration of this question.

II

ABSENCE OF A CLAIM COGNIZABLE IN A FEDERAL COURT

We held in Pamel Corp. v. Puerto Rico Highway Authority, 621 F.2d 33 (1st Cir. 1980), that damage actions against governmental entities stemming from land use policies were not cognizable in a federal court. Plaintiff in Pamel, like appellant in the instant case, sought damages equivalent to the value of property allegedly "taken" as a result of the restrictive zoning policies of the Puerto Rico Highway Authority. Id. at 34. We characterized

plaintiff's claim in Pamel as an inverse condemnation action, i.e., an action seeking fair compensation for the government's alleged unconstitutional extinguishment of plaintiff's property rights. While recognizing that "[r]egulation of property use may be so oppressive or arbitrary that it crosses the wavering line separating a valid exercise of the police power from an exercise of the eminent domain power," id. at 35, we determined that the proper remedy in such a case was not the awarding of the value of the diminished property right. There are strong policy arguments against any court requiring the state to purchase the property over which it has imposed excessive regulation. See Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L. Rev. 1439, 1452 (1974). Those arguments are even stronger when the court is a federal one. As we

stated in Pamel:

> "[F]ederal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole. Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation."

621 F.2d at 36 (citations omitted).[4]

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4. Since our decision in Pamel, the Supreme Court has decided San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981). It appears that at least eight of the Justices may disagree with our unwillingness to characterize oppressive regulation as a taking, see 450 U.S. at 628 n.8; id. at 651-53 (Brennan, J., dissenting), but only four would find that such a taking requires compensation, see id. at 653-58 (Brennan, J., dissenting). It may be that Justice Rehnquist's concurrence should be taken as a fifth vote in favor of compensation, see id. at 633-34 (Rehnquist, J., concurring), but deriving enough direction from his

Appellant invites us to limit Pamel to situations in which plaintiffs challenge an invalid zoning restriction. We decline the invitation. Under appellant's theory, Pamel would be inapplicable to the case at hand in which appellant alleges an unconstitutional deprivation due to wrongful conduct by governmental officials. The distinction is not persuasive. Whether the conduct is negli-

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brief comment in support of "much of what is said" by Justice Brennan to abandon our position that the constitution does not require compensation in this case seems to be carrying judicial tea leaf reading to an uncalled-for extreme. In any event, none of the Justices addressed the issue of federal court ordered compensation, since the lower court in San Diego Gas was a state court. Even if the consitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it. See Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974); Knight v. State of New York, 443 F.2d 415 (2d Cir. 1971); Beck v. State of California, 479 F. Supp 392 (C.D. Cal. 1979); Nasralah v. Barcelo, 465 F. Supp 1273 (D.P.R. 1979).

gent or not, the gravamen of the inverse condemnation claim remains the unconstitutional deprivation of property. Resort can still be made to a tort action in the state courts. The governmental freeze on appellant's property is sufficiently similar to the restrictive zoning in Pamel to bring this case within our holding in Pamel. Both cases involve allegations that state governmental agencies unconstitutionally deprived plaintiffs of property through land use controls. [5] Federal courts may

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5. Arguably, Pamel might be distinguished on the ground that there the cause of action was based on 42 U.S.C. Section 1983, while the instant case also is based directly on a violation of the Fourteenth Amendment. We find such distinction not dispositive. The same concerns which impel the result in the Section 1983 context likewise should govern in a "Bivens" action. Cf. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 712-13 (1978) (Powell, J., concurring) (liability of municipality should be the same whether predicated on Section 1983 claim or implied from the Fourteenth Amendment).

enjoin such unconstitutional conduct on the part of states in an inverse condemnation proceeding, but they may not award damages. The Commonwealth of Puerto Rico's unconstitutional "freeze" on appellant's property therefore does not subject the governmental entities to an action for damages in a federal court.

We affirm the judgment of the district court dismissing the instant action, but we do so on the grounds stated in this opinion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1395

CITADEL CORPORATION,
Plaintiff, Appellant

v.

PUERTO RICO HIGHWAY AUTHORITY, ET AL.,
Defendants, Appellees

Before

COFFIN, Chief Judge,
TIMBERS, *Senior Circuit Judge,
and BOWNES, Circuit Judge

ORDER OF COURT

Entered: February 2, 1983

It is ordered that the petition for rehearing filed on January 20, 1983 be, and the same hereby is, denied.

By the Court:

/s/ Dana H. Gallup

Clerk.

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* Of the Second Circuit, sitting by designation.